IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 539 OF 2006.

Sau.Prastibha Tulsidas Patil.
Age 30 years, Occ.: Service and
Professional Artist,
R/o. C/o.Shri Shantaram Trimbak
Salunke, A/p.Shewali (Datarati),
Taluka Sakri, Dist. Dhule. ... Appellant.

Versus.

Tulsidas Sukhdeo Pagar (Patil)
Age: 32 years Occ.: Labour,
R/o. Asthane, Taluka Malegaon,
District Nashik. ... Respondent.

Shri Anilkumar Patil for the Appellant.

Shri P.N.Joshi with Shri Kishor S.Patil for the Respondent.

CORAM : ABHAY S.OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED. : 30th August, 2007.

DATE ON WHICH JUDGMENT IS PRONOUNCED. : 30th October, 2007.

JUDGMENT.:

1. This Second Appeal arises out of an unfortunate dispute between the Appellant-wife and the Respondent-husband. The Respondent-husband filed a petition for divorce against the Appellant under the Hindu Marriage Act, 1955 (hereinafter referred to as "the said Act"). In the cause title of the Petition filed by the Respondent, it is stated that he is seeking a decree under clause (b) of section 13(1) of the said

Act. The marriage between the parties was solemnised on 10th May 1997. One of the allegations made by the Respondent in the petition is that the Appellant was having illicit relationship with her cousin one Dilip Jayram Salunkhe. It is alleged that after the marriage, the Appellant was employed in village Chitod, Dhule and therefore, she was separately residing at Dhule. He stated that the Respondent was residing in his village. However, he used to visit the Appellant's room at Dhule. It is alleged that the Appellant persistently refused to keep matrimonial relationship with the Respondent. It is stated that the Respondent was all along persuading the Appellant to behave properly. It is alleged that three months before filing of the petition, the Appellant left her premises along with articles owned by the Respondent such as utensils, cupboard, television set, ornaments etc. After the Respondent came to know about this fact, he visited the house of the Appellant's parents. According to the Respondent, he was insulted and driven away from the house of the Appellant's parents.

2. It is alleged that there was a criminal complaint filed against the Appellant and her said cousin regarding their illicit relationship and a case was pending against the Appellant in the Sessions Court. He stated that because of the said criminal case, the

marriage of the Appellant which was earlier settled with one Rajendra Patil did not materialise. It is alleged by the Respondent that the aforesaid facts were suppressed by the Appellant. It is alleged that the Appellant is participating in various programmes on Radio and Television. It is submitted that it is impossible for the Respondent to stay with the Appellant. It is submitted that the marriage between the Appellant and the Respondent has completely broken down.

3. The Appellant contested the petition by filing her written statement. The Appellant denied all the allegations regarding the illicit relationship with her cousin. The Appellant pointed out that the petition is liable to be dismissed on the ground of non-impleadment of the said Dilip Salunkhe. In the written statement the Appellant admitted that she was prosecuted along with Dilip Salunkhe at the instance of Dilip Salunkhe’s wife for offences under section 498A, 306 and 34 of the Indian Penal Code. It is pointed out that in the trial allegations of illicit relationship could not be established against her and the said Dilip Salunkhe and therefore, she was acquitted.

4. The Appellant pointed out that she has been acting on stage and she is also participating in various

programmes on Radio and Television. It is alleged that as the Respondent did not like the same, he started harassing the Appellant. It is stated that the Respondent used to demand money from the Appellant. She has stated that she used to comply with the said demand. However, whenever she was unable to comply with the said demand, the Respondent used to assault her. She has stated that various amounts were paid by her father to the Respondent. She has placed reliance on various letters written by her. She pointed out that she has lodged a complaint against the Respondent for commission of offences under section 498A, 323, 504 and 506 of the Indian Penal Code and the case is pending in the Criminal Court.

5. The trial Court framed issues. The first issue was as regards the allegations of adultery. The second issue was whether the Appellant proves that the Respondent was taking undue advantage of his own wrong and was making false allegations against him. The trial Court dismissed the petition and an Appeal was preferred by the Respondent before the District Court. Apart from framing points for determination on the issues framed by the trial Court, the Appellate Court also framed a point for determination as to "Whether the Appellant proves his claim for divorce on desertion and cruelty?" The Appellate Court allowed the Appeal of the Respondent and

passed a decree on the ground of adultery, desertion and cruelty.

6. When this Appeal came up before this Court on 12th July 2007, this Court directed the parties to remain present in chamber. Thereafter when the Appeal was heard in Chamber, an effort was made by this Court to pursuade the parties to come to an amicable settlement. As amicable settlement was not possible, on 31st July 2007 this Court admitted the Second Appeal on the following substantial questions of law:

i) Whether the Appellate Court could have considered the ground of adultery and committed an error in the passing a decree on the said ground inasmuch as the person with whom the Appellant had alleged adulterous relationship was not impleaded as a party to the petition?

ii) Whether the Appellate Court could not have passed a decree on the ground of cruelty inasmuch as there was no foundation for the said ground in the pleadings?

iii) Whether the Appellate Court completely ignored that the trial Court had not specifically framed an issue on the ground of cruelty?

iv) Whether the Courts could have passed a decree on the ground of desertion in the absence of proper pleadings in that behalf in the petition filed by the Respondent?

7. The learned Counsel for the Appellant submitted that the decree passed by the trial Court on the ground of adultery cannot be sustained as the Respondent failed to implead the said Dilip Salunkhe as co-Respondent. He submitted that the trial Court did not frame any issue regarding the ground of cruelty and desertion and therefore, the Appellate Court could not have passed a decree on the said grounds. It is submitted that even going by the averments made in the petition filed by the Respondent, the ground of desertion was not made out.

8. The learned Counsel for the Respondent submitted that there were specific pleadings on the grounds of desertion and cruelty. He submitted that the parties have led evidence as they were fully aware that the said allegations were involved in the petition. He submitted that as evidence was already led on the said issues, the Appellate Court has not committed any error. He submitted that there is no reason to upset the findings of fact recorded by the Appellate Court in this Second Appeal. He placed reliance on a decision of the Apex

Court in the case of Samar Ghosh v/s. Jaya Ghosh [(2007) 4 SCC 511].

9. I have carefully considered the submissions. A perusal of the Judgment of the Appellate Court shows that the Appellant Court has accepted the ground of adultery pleaded by the Respondent-husband. In paragraph 16 of the decision of the Appellate Court the following finding has been recorded:

> "However, in civil cases conduct of the parties on the touchstone of preponderance of probabilities is sufficient to establish by way of proof of a particular fact and as such when present respondent happened to be co-accused with her cousin brother Deelip Salunke and admission of said fact by the respondent is sufficient proof of her conduct and involvement in adulterous relation with her cousin brother Deelip Salunke has to be conclusively accepted by the Court by drawing inference on the basis of facts and evidence on record."

In this behalf it will be necessary to refer to the Rules framed by this Court in exercise of powers under sections 14 and 21 of the said Act of 1955. The said

Rules are known as Hindu Marriage and Divorce Rules, 1955 which have came into force on 1st December 1955. Clause (a) of Rule 5 of the said Rules reads thus:

> "5. **Necessary parties.** - (a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person as co-respondent. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds:
>
> (i) that the name of such person is unknown to the petition although he has made due efforts for discovery;
>
> (ii) that such person is dead;
>
> (iii) that the respondent being the wife is leading life of a prostitute and that the petitioner knows of no person with whom adultery has been committed;
>
> (iv) for any other sufficient reason the Court may deem fit to consider."

In view of the said Rule, the Respondent ought to have impleaded the said Dilip Salunkhe as a party Respondent.

Admittedly there was no application made by the Respondent for leave to dispense with the joinder of the said person as co-Respondent. Sub-Clauses (i), (ii) and (iii) of the aforesaid Rules are obviously not applicable. Existence of sufficient reason as contemplated by sub-clause (iv) above is not pleaded by the Respondent. A finding recorded by the Court of law against a party that the said party is having an adulterous relationship with a named third party has a serious consequences which affect not only the party to the proceedings but also the said third party. Considering the principles of fair play and natural justice, the aforesaid Rule 5 has been framed by this Court. The decree has been passed on the ground of adultery by the Appellate Court by completely ignoring the effect of the failure of the Respondent to implead the said Dilip Salunkhe as a party Respondent. Therefore, the decree passed by the Appellate Court on the said ground will have to be set aside. Therefore, I am not going into the merits of the findings recorded on the said aspect.

10. The compilation of pleadings and notes of evidence has been placed on record. In the petition filed by the Respondent, there is a specific assertion in paragraph 2 that the Appellant did not allow the Respondent to maintain matrimonial relationship with

her. In paragraph 3, the Respondent has referred to the prosecution launched against the Appellant and the said Dilip Salunkhe and the fact of the pendency of criminal case was not disclosed to the Respondent before solemnisation of the marriage. In the said paragraph the Respondent has reiterated that the Appellant deprived the Respondent of the pleasures of the matrimonial life and the very purpose of solemnisation of marriage has been frustrated.

11. In paragraph 4 of the petition, the Respondent has pointed out the conduct of the Appellant and he has stated that it has become impossible to live with the Appellant in view of the conduct and behaviour of the Appellant. Thus the ground of cruelty has been specifically pleaded by the Respondent. The Appellant has dealt with the said assertions in the written statement. In his examination-in-chief, the Respondent has stated that the Appellant stayed in the matrimonial home only for a period of two months and thereafter the Appellant was staying at Dhule in a separate room as she was employed at Dhule. He specifically asserted that whenever the Respondent visited the room of the Appellant, she declined to maintain any physical relationship with the Respondent. He has stated that the Appellant used to visit the place of her cousin Shri Dilip Salunkhe. He has alleged that the Appellant used

to visit the house of said Dilip Salunkhe in the night. He stated that when he visited the premises of said Dilip Salunkhe, he found the Appellant in a compromising position with the said Dilip Salunkhe. He stated that the Appellant left the room at Dhule along with her articles. He has stated that when he visited the house of the parents of the Appellant, he was abused. He also stated that he made efforts for a settlement with the Appellant through the intervention of the relatives, but the said efforts failed. He stated in evidence that on the basis of the dying declaration of the deceased wife of the said Dilip Salunkhe, a criminal prosecution was initiated against the Appellant and the said Dilip Salunkhe in which there was a specific allegation that they were maintaining an adulterous relationship. He stated that the fact of the said prosecution as well as the fact that on account of the said prosecution her marriage settled with one Rajendra Patil could not be solemnised was suppressed from him by the Appellant. The Respondent was cross-examined by the Advocate for the Appellant.

12. The Respondent examined his uncle Omkar Anna Pawar. His evidence is mainly on the alleged relationship between the Appellant and the said Dilip Salunkhe. The third witness examined by the Respondent is one Raghunath Mahadu Patil, who deposed that he was

made aware that the Appellant was not maintaining any physical relationship with the Respondent had therefore, he tried to persuade the Appellant to behave properly. According to him, he disclosed to the Respondent the fact of the criminal case filed against the Appellant and the said Dilip Salunkhe.

13. The Appellant examined herself. The Appellant was cross-examined by the Respondent. A perusal of the notes of evidence shows that the the parties were fully aware about the allegations of cruelty made by the Respondent against the Appellant. In paragraph 16 of the Judgment, the trial Court has specifically referred to the fact that apart from the ground of adultery, the Respondent was claiming divorce on the ground of cruelty. In fact in the last line of the said paragraph, the trial Court has recorded a finding that the Respondent has failed to prove that he suffered mental and physical cruelty and therefore, he is not entitled to a decree on the ground of cruelty. Thus the Appellant was all along aware that the Respondent was seeking a decree of divorce on the ground of cruelty. Though a specific issue is not framed by the trial Court, the trial Court has considered the submissions on the ground of cruelty and has negatived the said ground. Under the circumstances, the Appellate Court was justified in taking into consideration the ground of

cruelty. As the Appellant was fully aware at all relevant time that the ground of cruelty was pressed into service by the Respondent, there is no prejudice to the Appellant as a result of the failure of the trial Court to frame a specific issue on the ground of cruelty.

14. In so far as the allegation of desertion is concerned, I find that there are no specific pleadings. In fact the allegation in the petition filed by the Respondent is that three months prior to the filing of the said petition, the Appellant took articles in the room at Dhule and went away. The ground of desertion is not specifically pleaded in the petition filed by the Respondent and in fact a perusal of the judgment of the trial Court shows that the said ground was not agitated. Therefore, the Appellate Court has committed an error by framing a point for determination on the issue of desertion and therefore, the decree passed by the Appellate Court on the ground of desertion will have to be set aside.

15. Now it will be necessary to refer to the findings recorded by the Appellate court on the ground of cruelty. In paragraph 20 of the Judgment, the Appellate Court has held thus:

> "20. ..... but I have gone through the evidence and it appears that hardly for the period of two months of marriage, parties resided jointly and since then became separate. There appears to have no reunion between the parties since thereafter. If this period of two months is excluded then long standing desertion and cruelty is established. Refusal of respondent to give matrimonial association to appellant is sufficient to prove the factum of cruelty by respondent to appellant."

16. The fact that the Appellant was prosecuted along with the said Dilip Salunkhe is not disputed. The trial Court has not considered the aspect of the refusal of the Appellant to keep matrimonial relationship with the Respondent.

17. In the judgments of both the Courts below there is a reference to the fact that during the pendency of the proceedings, an attempt was made for settlement which failed. As stated earlier, even before this Court, similar attempts were made. The Respondent made a statement that he was prepared to withdraw the allegations against the Appellant, if the Appellant was prepared to take divorce by mutual consent. However,

the Appellant did not agree. Only after I found that the settlement was not possible, the Second Appeal was taken up for hearing.

18. It will be necessary to refer to the decision of the Apex Court in the case of Samar Ghosh (supra). In paragraph 101 of the said decision, the Apex Court has stated that no uniform standards can be ever laid down for guidance for deciding cases of mental cruelty. However, the Apex Court has enumerated some instances of human behaviour which may be relevant in dealing with the cases of mental cruelty. One of the illustrations noted by the Apex Court is clause (xiv) of paragraph 101 which reads thus:

> "(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

In the present case, the marriage between the parties was solemnised on 10th May 1997. The petition for divorce was filed on 30th July 1999. Admittedly on the date of filing of the petition, the parties were residing separately. At the time of filing of the petition, the age of the Respondent was 28 years and the age of the Appellant was 26 years. The matrimonial petition was earlier decided on 16th September 2002 against the Appellant. In the Appeal preferred by the Appellant, the District Court remanded the petition to the trial Court. So atleast from 1999 the parties are residing separately. There is a finding of fact recorded by the Appellate Court that there was a refusal by the Respondent to give matrimonial association to the Appellant and that parties were residing regether only for a period of two months and thereafter there is no re-union. Considering the law laid down by the Apex Court in the case of Samar Ghosh (supra), it is very difficult to disturb the aforesaid finding recorded by the Appellate Court on the ground of cruelty. In the circumstances, though the decree passed on the ground of desertion and adultery is required to be set aside, the decree on the ground of cruelty will have to be confirmed.

19. Hence the following order is passed:

(i) The Appeal is partly allowed.

(ii) The decree passed by the Appellate Court on the grounds of desertion and adultery is set aside.

(iii) However, the decree passed on the ground of cruelty is maintained.

(iv) There will be no order as to costs.

(v) Interim order passed by this Court will continue to operate for a period of eight weeks from today.

Judge.